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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

PETER J. NOWICKI,

Plaintiff and Appellant,

v.

MORAGA-ORINDA FIRE DISTRICT,

Defendant and Respondent.

A153833

(Contra Costa County  
Super. Ct. No. MSC17-01266)

Peter J. Nowicki appeals from the trial court's order sustaining without leave to amend the demurrer of the Moraga-Orinda Fire District (Fire District) to Nowicki's second amended petition for writ of administrative mandamus and complaint for injunctive relief and damages (complaint). Nowicki contends the court erred in finding both that his claims were barred by the Government Claims Act (Gov. Code, § 810, et seq.)<sup>1</sup> and that he had failed to allege facts sufficient to state causes of action for breach of contract, breach of the duty of good faith and fair dealing, and promissory estoppel. We shall affirm the order.

**FACTUAL AND PROCEDURAL BACKGROUND**

On November 15, 2017, Nowicki filed his complaint against both the Fire District and the Contra Costa County Employees' Retirement Association (CCCERA).<sup>2</sup>

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<sup>1</sup> All further statutory references are to the Government Code unless otherwise indicated.

<sup>2</sup> Previously, on July 10, 2017, Nowicki had filed a first amended petition for writ of administrative mandamus and complaint for injunctive relief and damages against the

The complaint alleged the following pertinent facts. Nowicki is a retired employee of the Fire District. He joined the Fire District in 1983 as a firefighter and from July 2006 until his retirement in January 2009, he served as Fire Chief. The employment agreement between Nowicki and the Fire District for his employment as Fire Chief included an annual salary of \$173,000 and other benefits. Section 5.1 of the agreement provided in part, “Employee may receive a salary adjustment as determined by the [Fire District Board of Directors] annually following a performance evaluation.” Section 7 of the agreement stated in relevant part, “Section 7.1. 3% at 50 Benefit. Employee shall receive the 3% at 50 retirement benefit subject to the terms and conditions as part of the Contra Costa County Plan that requires the employee to contribute 9% per year. District agrees to pay for the remaining costs of this benefit. [¶] Section 7.2. Retirement Contribution. . . . Employee shall pay One Hundred percent (100%) of the retirement contribution required of employees. . . .”

During his time as Fire Chief, Nowicki made the required retirement contributions to CCCERA,<sup>3</sup> in the amount of \$146,933.59, and the Fire District made the required employer contributions to CCCERA.

In May 2007, Nowicki submitted documentation to the Fire District regarding his performance during his first year as Fire Chief to support his request for an annual salary increase. The Fire District Board of Directors deferred approval of the request until February 6, 2008, when it approved an amendment to Nowicki’s employment agreement, retroactive to July 2007, increasing his salary to \$186,000 per year. On February 8, 2008, Nowicki exercised the right, contained in the amended agreement, to sell back 200 hours of his accrued, unused vacation time.

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Fire District and CCCERA. On October 27, after the trial court granted the Fire District’s demurrer with leave to amend and a portion of CCCERA’s demurrer without leave to amend, appellant filed the complaint at issue here.

<sup>3</sup> The complaint alleged that CCCERA is “a retirement board” within the meaning of article XVI, section 17, subdivision (h) of the California Constitution and section 31450 et seq. of the Government Code.

In May 2008, Nowicki again submitted documentation to the Fire District regarding his performance during his second year as Fire Chief, and the Fire District Board of Directors again deferred approval of the request until December 10, 2008, at which time the employment agreement was again amended, retroactive to July 2008. The amended agreement did not provide for a salary increase, but did give Nowicki the right to sell back an additional 260 hours of unused vacation time and to convert accrued unused administrative leave into vacation time. Between December 31, 2008 and January 5, 2009, Nowicki converted 320 hours of vacation time into a cash payment.

On January 30, 2009, Nowicki retired from the Fire District. He received a pension, administered by CCCERA and paid by both CCCERA and the Fire District, in the amount of \$20,076.00 per month. CCCERA paid him the maximum annual distribution allowed under Internal Revenue Service regulations, and the Fire District paid the remainder of the pension amount for that year. For example, in 2015, the Fire District directly paid Nowicki his retirement benefit for a portion of September and the entire months of October, November, and December.

On September 9, 2015, CCCERA held a hearing to review “ ‘acts of pension spiking, through members’ receipt of pay items that were not earned as a part of their regularly recurring employment compensation during their careers . . . .’ ” The Fire District was asked to attend the hearing but, through its counsel, informed CCCERA that it would not be at the hearing and would not take a position on the issue.

On September 11, 2015, Nowicki received a letter from CCCERA informing him that his pension would be reduced to \$14,667.74 per month, retroactive to the date of his retirement, on the ground that he had caused his “ ‘final average salary . . . to be improperly increased at the time of retirement,’ ” in violation of section 31539. On September 21, Nowicki received a letter from CCCERA stating that he had received retirement benefit overpayments in the amount of \$585,802.90, including interest, and was offered several options for repayment of the alleged overpayment.

Nowicki's operative complaint alleged three causes of action against the Fire District: for breach of contract, breach of the duty of good faith and fair dealing, and promissory estoppel.<sup>4</sup>

With respect to the breach of contract cause of action, the complaint alleged, *inter alia*, that Nowicki's employment agreement with the Fire District included the provision that "Nowicki would receive the '3% at 50 retirement benefit subject to the terms and conditions as part of the Contra Costa County Plan that requires the employee to contribute 9% per year.' " The complaint further alleged that both he and the Fire District made their required contributions to CCCERA during his tenure as Fire Chief and that although the Fire District delegated to CCCERA its responsibility of providing Nowicki with pension and retirement benefits, the Fire District reserved the right to change his retirement plan at any time, which constituted an acknowledgement that it retained control over and responsibility for compliance with the terms of the original retirement plan. The complaint further alleged, as to the breach of contract cause of action, that "CCCERA's retroactive reduction of Nowicki's retirement benefits was based solely on the Fire District's conduct in delaying contractual salary and benefit increases and in the use of a process which allegedly violated the Brown Act [(§ 54950, *et seq.*)]. Such conduct was beyond Nowicki's control and, if true, breached the contract between Nowicki and the Fire District. The complaint then set forth "[t]he monetary loss" he had suffered as a result of the Fire District's breach, including \$585,802.90 in rescinded pension and retirement benefits and the \$146,933.59 that the Fire District deducted from Nowicki's salary and gave to CCCERA to fund his retirement benefits, but which "were not returned to Nowicki when CCCERA reduced Nowicki's retirement benefits . . . ."

With respect to the cause of action for breach of the duty of good faith and fair dealing, the complaint alleged, *inter alia*, that the Fire District breached this duty by

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<sup>4</sup> The complaint also alleged causes of action against CCCERA for administrative mandamus and denial of equal protection in violation of the California Constitution.

“failing and refusing to approve Nowicki’s salary and benefit increases in a timely manner, and by engaging in Fire Chief contract negotiations in a manner which CCCERA claims to have been in violation of the Brown Act, and by failing to take the necessary steps to support [his] position with CCCERA,” which subjected Nowicki to the reduction of his retirement benefits. The complaint further alleged that these delays “constituted arbitrary and capricious conduct” on the part of the Fire District. The same “monetary loss” as set forth in the breach of contract cause of action was also alleged.

With respect to the cause of action for promissory estoppel, the complaint alleged, inter alia, that “[t]he terms of Nowicki’s retirement benefits constituted a promise by the Fire District,” which was embodied in the employment agreement and upon which Nowicki relied to his substantial detriment. The complaint further alleged that Nowicki had suffered “damages” based on his reliance on the Fire District’s promises in the same amounts set forth in the other two causes of action against the Fire District. The complaint also alleged that “exceptional circumstances exist[ed]” in the form of Nowicki’s repayment obligation and the Fire District’s refusal to refund his retirement contributions, which warranted application of promissory estoppel against the Fire District, “notwithstanding its status as a public entity.”

Finally, as to all three causes of action against the Fire District, the complaint alleged that Nowicki was exempt from the claim presentation requirement of the Government Claims Act, pursuant to the exceptions found in section 905, subdivisions (c) and (f).

In the portions of his prayer for relief that included the Fire District, Nowicki requested “reinstatement of his retirement benefits as they existed prior to defendants’ illegal conduct”; “[a]n order enjoining defendants from engaging in any further reduction of Nowicki’s retirement benefits”; “[a]n order that Nowicki be made whole for the monetary loss which he has encountered, plus interest at the legal rate”; and “[a]n award of costs and attorney’s fees.”

On November 30, 2017, the Fire District filed a demurrer to the complaint and on January 22, 2018, the court entered an order sustaining the Fire District’s demurrer

without leave to amend. The court first found that all of Nowicki's claims against the Fire District were barred due to his failure to allege compliance with the claim filing provisions of the Government Claims Act or to allege facts establishing any of the exceptions to the claim filing requirement, in particular, subdivisions (c) and (f) of section 905.

The court further found that Nowicki had failed to allege facts sufficient to state a cause of action for breach of contract, breach of the duty of good faith and fair dealing, and promissory estoppel. Specifically, as to the breach of contract cause of action, the court found that Nowicki had not shown that the Fire District had breached the contract between them by delaying his salary increases where the employment agreement did not require the Fire District to make any adjustments to his salary and, in any event, he had received retroactive pay after the Fire District approved his salary adjustments. As to the cause of action for breach of the duty of good faith and fair dealing, the court found that the employment agreement did not include requirements that the Fire District approve Nowicki's salary and benefit increases in a timely manner, engage in contract negotiations in a manner that complied with the Brown Act, or take the necessary steps to support his position with CCCERA, and the "covenant of good faith and fair dealing cannot impose substantive duties, other than the duties 'incorporated into the specific terms of the contract.' [Citation.]" Finally, as to the promissory estoppel cause of action, the court found Nowicki had not alleged the exceptional circumstances necessary to apply this theory to a public agency, given that his "true grievance is with CCCERA," not the Fire District, for the imposition of the significant pension repayment obligation.

On March 15, 2018, Nowicki filed a notice of appeal.<sup>5</sup>

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<sup>5</sup> CCCERA is not a party to this appeal, and Nowicki notes in his opening brief that his "claims against CCCERA in this action are still before the Superior Court below, after Nowicki defeated in part the CCCERA's demurrer to his [complaint]."

## DISCUSSION

We will first address Nowicki's contention that the trial court erred in finding that all of his claims against the Fire District were barred by his failure to comply with the claim filing requirement of the Government Claims Act. Nowicki argues that he was exempt from that requirement pursuant to the exceptions to the claim filing requirement found in section 905, subdivision (c), which exempts "[c]laims by public employees for fees, salaries, wages, mileage, or other expenses and allowances."<sup>6</sup>

### I. *Relevant Legal Principles*

On appeal from the trial court's order sustaining a demurrer without leave to amend, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. [Citations.]" (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.) " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"The Government Claims Act (§ 810 et seq.) 'establishes certain conditions precedent to the filing of a lawsuit against a public entity. As relevant here, a plaintiff must timely file a claim for money or damages with the public entity. (§ 911.2.)' [Citation.] '[T]he claims presentation requirement applies to all forms of monetary demands, regardless of the theory of the action,' subject to certain statutorily enumerated exceptions. [Citation.] . . . 'The failure to timely present a claim for money or damages to a public entity bars the plaintiff from bringing suit against that entity.' [Citations.] 'A cause of action that is subject to the statutory claim procedure must allege either that the

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<sup>6</sup> At oral argument, Nowicki expressly abandoned the argument, raised in the trial court and his briefing on appeal, that subdivision (f) of section 905 is also applicable to this case. We also decline to address Nowicki's untimely argument, which was not raised either in the trial court or in his briefing on appeal, that the continuous accrual theory is applicable here.

plaintiff complied with the claims presentation requirement, or that a recognized exception or excuse for noncompliance exists. . . .” (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 338.) Failure to allege facts demonstrating or excusing compliance with the Government Claims Act’s claim presentation requirement “subjects a complaint to general demurrer for failure to state a cause of action.” (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1240–1241.)

“ ‘The primary function of the [Government] Claims Act is to apprise the governmental body of imminent legal action so that it may investigate and evaluate the claim and where appropriate avoid litigation by settling meritorious claims. [Citation.]’ Thus, the statutory exceptions specified in section 905 are given a strict construction. [Citation.] . . . [¶] The legislative history of section 905 indicates the scope of the enumerated exceptions to filing claims was intended to be extremely limited. . . . [¶] Consequently, commentators have construed the section 905 exceptions as essentially nontortious claims ‘for which some other adequate claims procedure has already been devised or for which the procedural protection of the [Government] Claims Act is believed to be unnecessary.’ [Citation.]” (*J.C. Dalton v. East Bay Municipal Utility District* (1993) 18 Cal.App.4th 1566, 1573–1574; accord, *Nasrawi v. Buck Consultants LLC*, *supra*, 231 Cal.App.4th at p. 339.)

## **II. Applicability of the Section 905, Subdivision (c) Exception**

Nowicki contends an exception to the claim presentation requirement of the Government Claims Act is applicable here: Section 905, subdivision (c), which exempts “[c]laims by public employees for fees, salaries, wages, mileage, or other expenses and allowances.” (§ 905, subd. (c).)

The trial court sustained the demurrer on several grounds, including the ground that Nowicki had failed to file a claim with the Fire District under the Government Claims Act, explaining, *inter alia*, that the section 905, subdivision (c) exception was inapplicable because Nowicki “is not seeking to recover wages for unlawfully withheld wages for services provided. [Nowicki] alleged the Fire District, in conformity with the contract provisions of the employment agreement, as well as the standard retirement



contribution requirement, deducted \$146,933.59 from his salary and forwarded the funds to CCCERA. [Citation.] Now that his retirement benefits have been reduced, [Nowicki] alleges none of the sums that were deducted have been refunded and he seeks to recover them. However, [Nowicki] alleged the sums were deducted at a rate commensurate with his earning[s] as Fire Chief. Furthermore, [he] alleges the Fire District made employer contributions to CCCERA based upon his salary as Fire Chief. [Citation.] The deductions were made in accordance with the employment agreement and the retirement plan requirements. [Nowicki] has not alleged facts showing the Fire District has unlawfully withheld salary or wages he has earned. Thus, [Nowicki] has not alleged facts demonstrating the exemption under section 905[, subdivision (c)] applies to this case.”

The court then concluded that because Nowicki had failed to allege facts establishing an exemption under section 905, he “was required to file a timely government tort claim as a mandatory prerequisite to the filing of his complaint against the Fire District. [Nowicki] failed to do so and the claims are barred.”

We agree with the trial court’s analysis. The allegations of the complaint make clear that Nowicki does not simply claim that the Fire District owes him unpaid wages earned during his work as Fire Chief. (§ 905, subd. (c).) Rather, the three causes of action, despite their various names and theories, all concern Nowicki seeking monetary damages from the Fire District for its conduct in failing to approve Nowicki’s salary and benefit increases in a timely manner, engaging in contract negotiations in a way that CCCERA claimed violated the Brown Act, and/or failing to support Nowicki by refusing to take a position on CCCERA’s claims or attend the hearing, all of which supposedly led to CCCERA improperly reducing his retirement benefits. These kind of claims plainly do not fall within the limited scope of the relevant exception. (See, e.g., *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1080–1081 [neither § 905, subd. (c) or (f) exception applied where plaintiff did not seek to recover wages previously earned or benefits to which he was presently entitled, but instead sought “to obtain monetary damages for defendants’ alleged misconduct” in wrongfully terminating his employment].) Thus, because subdivision (c) of section 905 exempts only “claims for

salaries and wages which have been earned and not paid” (*Loehr*, at p. 1080), it is inapplicable to Nowicki’s claims against the Fire District, given that he does not allege that the Fire District failed to pay him an agreed upon salary or forced him to contribute more towards his pension than the nine percent a year specified in the employment agreement. (See *id.*, at pp. 1080–1081.)

In sum, because Nowicki’s three causes of action against the Fire District are *not* “essentially nontortious claims ‘for which some other adequate claims procedure has already been devised or for which the procedural protection of the [Government] Claims Act is believed to be unnecessary,’ ” they do not come within the “extremely limited” scope of the exceptions to the claims filing requirement. (*J.C. Dalton v. East Bay Municipal Utility District*, *supra*, 18 Cal.App.4th at pp. 1573–1574; see § 905.) Nowicki was therefore required to file a timely claim under the Government Claims Act, but did not do so. The Fire District’s demurrer to the complaint was properly sustained without leave to amend on this ground.

Given our conclusion that the trial court correctly found that Nowicki had not complied with the claim presentation requirement of the Government Claims Act and that no exception applied, we need not address Nowicki’s other arguments on appeal, that is, whether the complaint alleged facts sufficient to state causes of action for breach of contract, breach of the duty of good faith and fair dealing, or promissory estoppel. (See *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 [“The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken’ ”].)

### **DISPOSITION**

The order sustaining the Fire District’s demurrer without leave to amend is affirmed. Costs on appeal are awarded to the Fire District.

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Kline, P.J.

We concur:

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Richman, J.

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Miller, J.

*Nowicki v. Moraga-Orinda Fire District* (A153833)